TAX ON INTEREST FOR RECORDING DEED OF TRUST.

A petition was recently made to the Corporation Court of the City of Charlottesville for a mandamus to compel the commissioner of accounts to certify the accounts of the clerk of the court, which the commissioner had refused to do because the clerk had failed to collect the recordation tax on interest on deeds of trust and mortgages.

This proceeding involved the construction of the 13th section of the Tax Bill providing for a tax on deeds and deeds of trust, in the following language: "On deeds of trust or mortgages the tax shall be assessed and paid upon the amounts of bonds or other obligations secured thereby."

On behalf of the petitioner it was contended that in assessing the tax on deeds of trust or mortgages securing bonds or other obligations the tax should be computed only upon the principal sum thereof, and not upon the principal sum and interest.

On behalf of the commonwealth it was contended that the tax should be computed not upon the principal sum alone, but upon the principal sum and interest, for the reason that the interest is as much a part of the obligation secured as is the principal sum.

Mr. Leslie C. Garnett, Assistant Attorney-General, appeared on behalf of the Commonwealth and argued from the following brief:

"The exact question as proposed has not been decided by the courts of Virginia but similar questions have received judicial construction.

(1) In Roberts *v.* Cocke, 28 Gratt. 207, Judge Burks held as follows:

> 'Whenever there is a contract expressed or implied for the payment of legal interest the obligation of the contract extends as well to the payment of the interest as it does to the payment of the principal sum.'

This expression has been approved by the Supreme Court of Appeals in Cecil *v.* Hicks, 28 Gratt. 1; Kent *v.* Kent, 28 Gratt. 840; McVeigh *v.* Howard, 87 Va. 599.

If the contract embodies interest and the obligation of the contract extends as well as to the payment of the interest as to

the payment of the principal sum, it would seem clear that a deed of trust securing a contract payable with interest secures the payment of interest as well as the payment of the principal sum.

Therefore it would seem to follow that the tax computed on deeds of trust upon the amounts of bonds or other obligations secured thereby must be computed upon both principal and interest.

(2) If the Legislature of Virginia had intended to exclude interest in computing the amount of the bonds or other obligations secured it would have said so, since in the various sections of the Code conferring jurisdiction upon the Courts of the Commonwealth the jurisdictional amounts have been set out exclusive of interest.

In Section 2939, defining the jurisdiction of Justices of the Peace, jurisdiction is conferred where the claims do not exceed $100.00 exclusive of interest.

In Section 3058, defining the jurisdiction of Circuit Courts, it provides—'They shall have original and general jurisdiction of all cases in chancery and civil cases at law, except cases at law to recover personal property or money not of a greater value than $20.00, exclusive of interest.'

In determining the 'amount in controversy' in order to give the Supreme Court of Appeals jurisdiction under the section 3455, interest is always included in computing the amount in controversy for the reason that the section referred to only excludes costs. In other words, if the principal sum involved is $275, upon which interest amounting to $26.00 has accrued prior to the date of the judgment of the lower court, the amount in controversy is $301.00 and the Supreme Court has jurisdiction.

If, therefore, the Legislature of Virginia in conferring jurisdiction upon the Justices of the Peace and upon Circuit Courts found it necessary in stating the jurisdictional amount to specifically exclude interest, and if the Supreme Court in determining its own jurisdiction includes interest because it is not excluded, the rule of construction would appear to be that the term 'amount in controversy' or 'amount of claim' would necessarily include interest as a part of the amount in controversy

or part of the amount of the obligation unless it was expressly excluded.

Further in sections 3572 and 2669, the Legislature in providing that no bill to enforce the lien of a judgment until after certain notice is given, provides— 'If the amount of the judgment does not exceed $20.00, exclusive of interest and costs.'

Wherever then interest is to be excluded in computing the amount of a claim or the amount of judgment or the amount in controversy it has been effected by the direct enactments of the Legislature.

A reference to some of the decisions in other states may be of value.

In Kentucky a statute providing that the Appellate Court should not have jurisdiction where the amount in controversy did not exceed a certain value, was construed to include the interest due on the date at the time the action was commenced. Orth *v.* Clutz's Adm., 57 Ky. 223, 225.

The amount in controversy as used in the statute taking away the right of appeal except and when the amount in controversy exceeds $20.00, includes not only the principal of a promissory note but also the interest thereon, and hence an appeal must be taken when the combined sum is over $20.00, though the principal is less than that amount. Smith *v.* Smith, 15 Vt. 620, 621.

The principle enunciated by the Vermont Court is the law of Virginia today as to appeals to the Supreme Court of Appeals, because in the section conferring jurisdiction upon that court the jurisdictional amount is not stated as exclusive of interest. The jurisdictional amounts set out in the Code as to the Justices of the Peace and the Circuit Courts are by statute expressly set out as exclusive of interest.

(3) 'A mortgage securing an existing debt or a written obligation for the payment of money, or which interest is reserved, will likewise secure such interest as it accrues, both in respect to the extent of its lien and for purposes of foreclosure or redemption: and this, although the interest is not specially mentioned as being a part of the obligation secured by the mortgage.' 27 Cyc. 1065, Paragraph 5.

(4) In 2 C. J. 1329, the following definitions of the word "amount" are given:

> 'AMOUNT The effect, substance, or result; the sum or total; the total of two sums; the sum total of two or more aggregate sums or quantities; the whole; the whole quantity; the aggregate; a totality. Sometimes contracted to "amt."'

Following the quotation a number of citations are given in this work one of which is the case of Connelly *v.* Western Union Telegraph Company, 100 Va. 51, wherein the Supreme Court of Appeals, quoted the definition above, which is taken from Webster's dictionary.

In Cratty *v.* City of Chicago, 217 Ill. 453, 75 N. E. 343, the validity of an ordinance of the City of Chicago providing for an assessment to pay for certain improvements was called into question. The City had delivered to the contractor interest bearing vouchers and improvements in the aggregate amount of the cost of the improvement. The preamble to the ordinance set out this fact and further said 'of which there now remains outstanding unpaid the amount of $11,886.05' and the ordinance itself found the same unpaid balance. It was unlawful to issue interest bearing obligations and it was contended by the contractor that the statement in the preamble that the vouchers were interest bearing was a clerical error and that the sum of $11,886.05 was the unpaid balance of the cost of the improvement. The court said: 'In speaking of interest bearing obligations the word' 'amount' is ordinarily used to designate the total of principal and interest.' The court further held that in view of this fact and in view of the recitals in the preamble to the ordinance the record did not disclose that the preamble was a clerical error and that being unable to separate the principal and interest in the sum stated as unpaid balance, the ordinance was void.

(5) It may be well to note that in Saville, Clerk *v.* Virginia Railway & Power Company, 114 Va. 44, approving the Pocahontas Collieries Company *v.* Commonwealth, 113 Va. 108, the court held that the tax on the recordation of a deed is not a tax upon property but upon a civil privilege of which anyone may avail himself or not, as he pleases, and the power of the Legis-

lature to impose it and fix the amount thereof is well nigh unlimited so long as the classification is reasonable."

The court held that the clerk should, in computing the recordation tax on deeds of trust and mortgages, have included interest as well as the principal sum of the bond or other obligation secured, and refused to grant the writ of mandamus to compel the commissioner of accounts to certify the accounts of the clerk

Editor's Note.—Interest is compensation for the use or forbearance of a sum of money, which is called the principal. See Turner *v.* Turner, 80 Va. 379.

It is true as argued by the commonwealth that the obligation of the contract extends to the payment of interest, as well as to the payment of the principal.

Interest is the legal incident of the debt, and the rights to it is founded on the assumed intention of the parties. Cecil *v.* Hicks, 29 Gratt. 1.

"The use of money is a valuable and legal consideration for a promise to pay legal interest thereon." Crenshaw *v.* Seigfried, 24 Gratt. 272.

In the absence of any express agreement for the payment of interest, in obligations for the payment of a certain sum of money on demand, or on a given day; interest on the principal sum from the time it becomes payable is a legal incident of the debt, and the right to it is founded on the presumed intention of the parties. Chapman *v.* Shepherd, 24 Gratt. 377; Kent *v.* Kent, 28 Gratt. 840; Roberts *v.* Cocke, 28 Gratt. 207; Cecil *v.* Hicks, 29 Gratt. 1; McVeigh *v.* Howard, 87 Va. 599, 13 S. E. 31. See also, Cecil *v.* Deyerle, 28 Gratt. 775.

Of course, a deed of trust securing a contract payable with interest, secures the payment of interest as well as the payment of the principal sum.

But, while it is true that the obligation of the contract and the security of the deed of trust extend to interest, what is meant is simply that the borrower is obligated to pay interest and that all the binding elements of the principal contract, such as writing, consideration, etc., extend to the additional agreement to pay interest. By holding that the obligation extends to interest, the cases clearly show that there are two separate agreements, (1) that relating to the principal sum, and (2) that relating to interest, to both of which the obligation of the contract extends. The reasoning in these cases is based upon the theory that there are two agreements for two distinct payments, but the obligation of the contract extends to both.

What is meant by the obligation of the contract? There is no need to search authorities. It means its binding force, which arises

from the presence of the necessary elements of an enforcible contract. And what is meant by the obligation of the principal contract extending to the collateral agreement to pay interest is that it carries to such collateral agreement all the valid elements of the principal contract and makes such agreement enforcible.

But what has all this to do with the amount of the contract? It would cetrainly seem to be perfectly clear to every one that the fact that the obligation of the contract extends to the agreement to pay interest is entirely irrelevant to the question of the amount of the principal contract. It in no way concerns the amount of the principal sum and is irrelevant to an inquiry thereto.

The second ground of argument advanced by the commonwealth, is that, if the legislature had intended to exclude interest in the computation of the amount of the bonds or other obligations secured, it would have said so, and reference is made to other sections of the Code relating to jurisdiction of courts which expressly exclude interest.

The contention that, if the legislature had intended to exclude interest, it would have said so, is directly opposed to the settled rule of statutory construction, that that which is omitted is intended to be excluded.

A statute may be construed by implication, but such implication must necessarily and clearly arise from the language used in the act and must be as much a part of the act as if it had been expressed in so many words. As the legislature is presumed to have expressed all that is intended; the implication must be clear, necessary and irresistible to add to the express words of the statute, and no mere omission or failure to provide for a certain thing will justify any judicial addition to the language of the statute. The general rule is that where a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe.

In order that a provision may be read into a statute by implication, such implication must arise either from the express words of the statute or the clearly apparent intention of the legislature. In the present provision of the tax laws there is nothing in its wording nor is there an apparent intention of the legislature that the interest on bonds or other obligations secured in deeds of trust or mortgages should be computed in determining the amount of such bonds. The provision should be construed to exclude interest. Under the rule that if the legislature had intended to include interest it would have said so.

This is more than a mere rule of construction, it is a rule of law, for the acts of the legislature must be expressed and statutes cannot be made by silence or implication.

As mentioned, the commonwealth makes reference to the fact that

in other provisions of the Code, relating to jurisdiction, interest is expressly excluded, and contends that if the Legislature expressly excludes interest in such sections but does not do so in the provisions relating to taxation, that the latter provision must be construed to include interest. It is true that expressio unius est exclusio alterius is a rule of statutory construction. But the rule is no applicable here, because the different sections of the Code are not in any way connected or related to each other, and the thing expressed and the thing not expressed, while it is "interest," is used in sections of the Code which can not be construed together.

It is a rule of statutory construction that a statute is to be construed with reference to other statutes relating to the same subject matter, which in a measure justifies reference to other provisions of the Code relating to interest on the amount necessary to give jurisdiction to the courts. But while interest is mentioned in the different sections, their subject matter is entirely different. Under the tax laws it is the amount of the bond, while under the sections relating to jurisdiction it is the amount in controversy, not the amount of the bond or other obligation sued upon.

The sections of the Code relating to jurisdiction of courts and those relating to taxation, are in no sense in pari materia and for that reason can not be construed together as a single system of laws relating to the same subject-matter.

When we consider that in practically every action the plaintiff makes a claim to interest, and that such fact has always been known to the legislature and at the time of the passage of laws relating thereto, the legislature has responded to such knowledge by expressly mentioning interest, it is justifiable to conclude that the expression of interest is evidence that the legislature had such subject in mind.

But when we read the tax laws, we find no mention of interest and because interest is not mentioned, is it not well and proper to conclude that the legislature did not have interest in mind and for that reason did not intend to include interest? If such a proposition as has been advanced by the Attorney-General had been for a moment in the mind of the legislature, would not the legislature have mentioned interest?

The definitions of "amount" given by the commonwealth, are generally inapplicable. The only one which could be applied to reach the result intended for by the commonwealth, is "the total of two sums." The total of two sums is the result found by adding two known quantities, not by adding a known and an unknown quantity. It is not the process by which we proceed to find one of the added quantities, but to find the total of several added quantities. In Connelly v. Telegraph Co., 100 Va. 51, "amount" is defined to be the sum total of two or more particular sums or quantities. According to these definitions "amount" is the total of stated quantities. In the statute, interest is neither stated, nor can it be, by implication, made suffi-

ciently certain to, be totaled with the amount of the bond by the process of addition.

The case of Cratty *v.* Chicago does define the word "amount" to designate the total of principal and interest, but reference to the opinion will show that the court was speaking of interest unpaid and long due. The court, in fact, does not define "amount" but "amount unpaid." The quotation made from the case by the commonwealth isolates a connected statement. To show this and to explain what the court meant it is necessary to quote a little more of the opinion than is quoted by the commonwealth, which is "The preamble recites that the vouchers were interest-bearing, and that 'the amount' unpaid is $11,886.05. In speaking of interest-bearing obligations, the word 'amount' is ordinarily used to designate the total of principal and in interest." Cratty *v.* City of Chicago, 217 Ill. 453, 75 N. E. 343, 344.

It is true, as pointed out by the commonwealth that the recordation tax is a privilege and not a property tax. But this is a fact which can in no way bear upon the construction of the statute contended for. Certainly as far as interest is concerned statutes providing for privilege taxes are to be construed as are those providing for other taxes.

It is a rule of statutory construction that tax laws are to be construed strictly. By strict construction is meant that provisions which are not clearly embraced in a statute are not to be brought within its provisions by extended construction. This statute must necessarily be construed strictly and such construction excludes the computation of interest in determining the amount of the bond, etc.

Section 489 of the Code provides that the rules of construction prescribed in chapter two shall be observed in the construction of tax laws, but there is nothing in such chapter bearing upon the question here considered.

Despite the fact that this provision has received the construction of the attorney-general and other officials of the state to require the payment of recordation tax on the interest of deeds of trust and mortgages, such construction seems to be erroneous and the collection of such taxes is unlawful. In addition, it is undoubtedly unjust because it is a tax upon unaccrued interest which is a thing not yet in existence. A reading of the statute by giving the word "amount" its ordinarily accepted meaning, in which sense the legislature undoubtedly intended to use the word, it means the face value of the bond or other obligation secured. What is the amount of a bond, note, share of stock or other evidence of debt? According to the general acceptation of "amount" it is their face value. If any one were asked, "What is the amount of this bond?" he would, from ordinary knowledge, reply, "One thousand dollars" or whatever its face value should happen to be.

T. B. B.